SUPREME COURT, U.S.
DEC 26 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1002

JOHN CARLYLE RICHARD,
Respondent,

versus

DRESSER OFFSHORE SERVICES, INC.,
Petitioner.

JOHN CARLYLE RICHARD,
Respondent,

versus

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

JOHN CARLYLE RICHARD,
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versus

DRESSER OFFSHORE SERVICES, INC.,
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JOHN CARLYLE RICHARD,
Respondent,

versus

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dresser Offshore Services, Inc., and Insurance Company of North America, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

There is no written opinion on the merits by the District Court in and for the Western District of Louisiana in *John C. Richard vs. Dresser Offshore Services, Inc.* and *Insurance Company of North America* Civil Action #16568; the opinion of the United States Court of Appeals for the Fifth Circuit in this case (Appendix "A", *infra*, p. 1a) is reported as an "Affirmance Without Published Opinion" at 481 F.2d 1402.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *John Carlyle Richard vs. Dresser Offshore Services, Inc.* and *Insurance Company of North America* (No. 73-2271) was entered on September 7, 1973. (Appendix A *infra* p. 1a) A rehearing in this case was denied by the Fifth Circuit Court of Appeals on October 4, 1973. (Appendix B *infra* p. 2a) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit has denied respondents due process of law by disposing of the issues involved in this case under that court's rules 18 and 21.

2. Whether grave and prejudicial errors were made by the trial judge in the instructions to the jury with reference to elements of comparative negligence, future loss of earnings and items of general damages.

3. Whether the Court of Appeals for the Fifth Circuit erred in failing to enter a remittitur to reduce the District Court's judgment of $125,000.00 for the removal of a coccyx where the medical testimony was uncontroverted that the plaintiff was disabled for nine months and was able thereafter to return to work without any disability.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "... Nor be deprived of life, liberty, or property, without due process of law; . . ."

Rule 18 of the Rules of the United States Court of Appeals, Fifth Circuit, provides as follows:

> "Rule 18 Summary Calendar
>
> (a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.
>
> (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. vs. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

As amended July 1, 1971."

Rule 21 of the Rules of the United States Court of Appeals, Fifth Circuit, provides as follows:

"Rule 21 Affirmance Without Opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See N.L.R.B. vs. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

Added July 1, 1970."

STATEMENT

Respondent, John C. Richard, filed suit against Dresser Offshore Services, Inc. and Insurance Company of North America under the Jones Act and under the General Maritime Laws, including concepts of Breach of Warranty of Seaworthiness and Maintenance and Cure, as a result of an accident which occurred on July 15, 1970 when the plaintiff fell off a ladder approximately 10 feet onto the top of a shed, sustaining some injuries. Petitioners filed a general denial with an alternative allegation of comparative negligence.

The trial began on December 14, 1972, which was a Friday, there was an intervening weekend, and it was concluded on December 17, 1972.

On December 17, 1972, the matter was argued to the jury, the Judge instructed the jury with reference to the legal principles involved, the petitioners objected to some of the charges given by the court, the failure to give some of the requested charges given by the respondent and the matter was then submitted to the jury on special interrogatories. During the deliberations, the jury asked for, in addition to other matters, the discount table referred to by the court with reference to future loss of earnings and the statement by

the court with reference to work-life and life expectancy. The jury, answering special interrogatories, found negligence, unseaworthiness, comparative negligence on the part of the plaintiff to the extent of 10%, and damages in the amount of $125,000.00. The petitioner's thereafter timely filed a motion for judgment notwithstanding the verdict and alternatively for new trial and/or remittitur. Subsequently, a supplemental alternative motion for new trial was filed which motions were denied and petitioners perfected an appeal to the United States Court of Appeals for the Fifth Circuit. (*John Carlyle Richard vs. Dresser Offshore Services, Inc. and Insurance Company of North America*, No. 73-2271.)

After complying with all procedural requirements for lodging the appeal with the United States Court of Appeals for the Fifth Circuit, the petitioners were notified on August 30, 1973 that the Fifth Circuit Court of Appeals pursuant to local Rule 18 had transferred the case to the summary calendar for disposition. As a result of being placed on the summary calendar, respondents were denied the right to orally argue their case and on September 7, 1973, the Fifth Circuit Court of Appeals rendered a per curiam opinion "AFFIRMED. See Local Rule 21." Thereupon, the petitioners petitioned for rehearing which was denied on October 4, 1973.

REASONS FOR GRANTING THE WRIT

I. Petitioners Have Been Denied Due Process Of Law In The Disposition Of The Issues Involved In This Case Because Of The Action Of The United States Court Of Appeals, Fifth Circuit, Taken Pursuant To Its Rules Numbered 18 And 21.

The Fifth Amendment of the Federal Constitution prohibits the depriving of any person, natural or artificial, of property without affording "Due Process." Part of the due process requirement is the concept of a "hearing" in all judicial determinations, and the concept of "hearing" is set forth in Section 46 of Title 28 U.S.C.A. which provides in subsection C that:

> "Cases in Controversy *shall be heard* and determined by a court or division of not more than three judges unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in the regular act of service." (Emphasis Added.)

The United States Supreme Court in the case of *United States vs. Hayman*, 342 U.S. 205, 2 S. Ct. 263 (1952), in defining the word "hearing" as used in Section 2255 of Title 28 of the United States Code Annotated, stated:

> "In requiring a 'hearing' the section 'has obvious reference to the tradition of judicial proceedings'. Respondent denied an opportunity to be heard, 'has lost something indispensible, however convincing the ex-parte showing'."

The concept of a "hearing" is well delineated in the United States Supreme Court Rules. Rule 44 provides for oral argument and goes into this extensively. Even in cases on the summary calendar, each side has one half hour for oral argument. (Paragraph 3 of Rule 44.) The right to oral argument, and its importance in the advocacy of a case, is stated in Rule 45 of the United States Supreme Court, which states:

> "The Court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

Oral argument is an indispensible part of a "hearing" for it is by both the written and the spoken words that effective communication of the issues to the court is insured. Oral argument is especially necessary at the appellate level where the validity of the witnesses' testimony is lost in the inert record and it is only through the advocate that the vitality is restored.

The Appellate Judges have in the past, relied on their law clerks for the primary study of the record and the specific points of law. The writer was a legal clerk for the Orleans District Court Judges and remembers the extent to which some of the Judges relied on the clerk's basic research. Oral argument presents the safeguard against human error in this type of situation.

And last, but not least, it is through the personal confrontation of persons — between the lawyer and the Judge and between the Judges in the panel in their own deliberations — that a judge is able to determine where the weaknesses and strengths are to be found in the advocate's case. Certainly more cases can be decided if no time is devoted to oral argument and no time is taken for face-to-face discussion among the deciding judges, but this should not be done at the expense of the litigants.

The writer recognizes that expediency in the handling of the increasing number of appeals has constrained the court to adopt the "summary rule," but in doing so and disposing of cases in a summary manner without permitting oral argument, due process is effectively denied to the litigant. Mr. Cicero Sessions and Mr. Samuel Gainsburgh of New Orleans along with other notable trial lawyers submitted statements at the hearing by the Commission on Revision of the Federal Court Appellate System in New Orleans, Louisiana, on August 22, 1973 which point out that the adjudication of cases on appeal under their summary procedure violates the requirements of the due process clause of the Constitution. (See Appendix D and E.)

It is respectfully submitted that the summary disposition of this case under the Rules of the Fifth Circuit Court of Appeals, deprived defendants of due process as required by the Constitution of the United States, and therefore, a Writ of Certiorari should be granted herein, directed to the Fifth Circuit Court of Appeal.

II. Grave And Prejudicial Errors Were Made By The Trial Judge In The Instructions With Reference To Elements Of Comparative Negligence, Future Loss Of Earnings And Items Of General Damages.

A. The Court Erred In Failing To Grant Petitioner Instructions With Reference To Comparative Negligence.

The Court instructed the jury with reference to the issue of comparative or contributory negligence as shown in the transcript beginning on Page 278 and ending in the middle of Page 279. Nowhere does the Trial Judge define what contributory negligence is, or what the duty on the part of the respondent was to exercise care for his own protection.

The petitioner submitted the following instruction to the Court:

> "Plaintiff was obliged to make reasonable use of his faculties and senses to observe and avoid danger, and he must be presumed to know what the ordinary use of his faculties would make apparent to him. His failure to observe or avoid any such danger that is observable and avoidable constitutes contributory negligence on his part. *Honoy vs. Harding,* 300 F.Supp. 696 and 699; *Ellington vs. American Mail Line, Ltd., et al.,* 163 F.2d 133; *Naigle vs. Isprantesen Company, Inc.,* 177 F.2d 163 (2nd Cir. 1949.)"

This petitioners' charge was Number 12 and the failure to give it by the Trial Court was objected to as shown on Page 288 of the transcript.

This particular Charge Number 12 was important to have been given in this particular case because of the respondent's gross negligence in using only one hand to climb the ladder and thereafter upon reaching the area of the main beam where he was required to walk across to get on to the third ladder, he not only failed to use the ladder extension which existed above the beam, but blindly and without using his senses whatsoever, reached out erroneously assuming that the beam was an I-beam, found no support and fell.

It is submitted to this Court that *had* the Trial Judge defined the concept of contributory negligence or comparative negligence and used petitioners' Charge Number 12, the percentage of comparative negligence on the part of the plaintiff would have been much greater. Accordingly, the Trial Court's refusal to grant this charge was prejudicial to the petitioners, thereby entitling them to a new trial.

B. The Court Erred In Charging The Jury With Reference To Future Loss Of Earnings And Future Impairment Of Earning Capacity On The Basis That There Was No Evidence On Which To Base These Instructions.

In the present case the Trial Judge instructed the jury with reference to impairment of earning capacity and future loss of wages as reflected on Pages 282

and 283 of the transcript. As shown on Page 290 of the transcript, petitioners objected to the charges with reference to impairment of earning capacity and future loss of wages on the basis that there was no evidence in the record to substantiate those items of damages.

The jurisprudential law is to the effect that for there to be recovery for future loss of wages, future impairment and pain and suffering, there must be medical testimony to substantiate the respondent's contentions. In *American Fire and Casualty Company vs. Jackson,* 187 F.2d 379 (1951), the Court held that where the medical testimony was to the effect that the probabilities were that the plaintiff had recovered from her injuries and would suffer no future pain and suffering, the mere testimony of the plaintiff was not sufficient to establish future loss of wages and pain and suffering and held the verdict to be excessive.

Again in *Abernathy vs. Southern Pacific Company,* 426 F.2d 512 (1970), the Fifth Circuit Court of Appeals held that the testimony of the plaintiff and her son with reference to future medical expenses, loss of earnings, pain and suffering of the son in the absence of medical testimony was insufficient "as a matter of law" to recover for those items of damages. Again the verdict in that case was held to be excessive and the District Court instructed to enter a remittitur. See also *Rheaume vs. Patterson,* 289 F.2d 611 (2nd Cir. 1961) and *Keaton vs. McCook,* 210 F.Supp. 226 (W.D. Ark. 1962).

There are cases from other jurisdictions which support the same principle of law. In *Diemel vs. Weirich,* 58 Northwestern 2nd 651 (Wis. 1953), the Court after stating the principle of law that where an injury is subjective in character and of such a nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, the courts require the introduction of competent expert opinion testimony to that effect before allowing recovery, stated as follows on Page 652:

> "We believe that sound public policy requires adherence to such rule. It is a rare personal injury case indeed in which the injured party at time of trial does not claim to have some residual pain from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long in their opinion they think such pain will continue in the future, and fix damages therefore accordingly. Only a medical expert is qualified to express an opinion to medical certainty, or based on medical probabilities (not mere possibilities), as to whether the pain will continue in the future, and, if so, for how long a period it will so continue. In the absence of such expert testimony (which was the situation in the instant case) the jury should be instructed that no damages may be allowed for future pain and suffering.

> "We, therefore, conclude that it was prejudicial error not to have given the requested instruction, and instead to have instructed the jury that they might take into consideration future pain and suffering in fixing the plaintiff, Ida Diemel's damages."

In *Jones vs. Berry*, 45 Southeastern 2nd 1 (W.Va. 1947), the Court there assigned as prejudicial error the Court's instructions as to future pain and suffering where there was no medical expert testimony to substantiate any such claim.

In *Brush vs. Eastern Motor Dispatch, Inc.*, 104 Northeastern 2nd 700 (Ohio 1950), the plaintiff claims to have suffered from headaches and from knee injury but no medical testimony was introduced with reference to future pain and suffering. The Court of Appeals of Ohio held that instructions along the lines allowing for future pain and suffering was prejudicial error.

Bachran vs. Morishige, 469 Pacific 2nd 808, the Court there held that in the absence of medical testimony that there was reasonable probability that the plaintiff would experience pain and suffering and would be disabled in the future, the Trial Court erred in charging the jury on the question of future pain and suffering.

In *Herndon vs. Crawford*, 119 Northwestern 2nd 82 (Neb. 1963), the Supreme Court there also held that an instruction with reference to future pain and suffering without expert testimony to back it up was prejudicial error.

In *Klein vs. Hodgman & Sons, Inc.*, 85 Northwestern 2nd 289 (S.Ct. of S.D. 1957), the Court there held in a back injury case that where the plaintiff who was still complaining of pain and disability at the time of trial failed to introduce medical evidence to establish future pain and suffering, the instruction including the items of damages of future pain and suffering was prejudicial error.

Again in *Prather vs. Phillis Wheatley Association*, 193 Northeastern 2nd 290 (Court of Appeals of Ohio 1963), the Court held that instructions along the lines of future pain and suffering and disability in the absence of medical testimony to that effect, was prejudicial error.

In the present case, there was no medical testimony whatsoever to substantiate any allegations of future pain and suffering, loss of earning capacity, future loss of wages and, accordingly, that the Trial Court erred in giving these instructions to the jury. There is no question that these instructions were prejudicial since the jury awarded to the respondent ONE-HUNDRED TWENTY-FIVE THOUSAND AND NO/100 ($125,000.00) DOLLARS for removal of the coccyx, possible two fractured ribs and a laceration of the leg. The gross excessiveness of the award will hereinafter be discussed. It is therefore submitted to this Court that the Trial Judge, in giving instructions with reference to future loss of earnings and future loss of earning capacity, erred, that the error was prejudicial and, accordingly, petitioners are entitled to a new trial.

C. The Court Erred In Failing To Give Petitioners' Instructions With Reference To The Award Not Subject To Federal And State Taxes.

Petitioners are objecting to the Court's failure to give instructions that the award is not subject to federal and state taxes. There is a conflict in the Federal Court of Appeals Circuits:

The *Fifth Circuit* has held that the Trial Court is *not* to charge the jury that the award is not subject to income taxes. *Cunningham vs. Bay Drilling Company*, 421 F.2d 1398 (1970).

The *Third Circuit* has held that the Trial Court is to charge the jury that the award is not subject to income taxes. *Domeracki vs. Humble Oil & Refining Co.*, 443 F.2d 1245 (1971.)

The *Second Circuit* has held that the Trial Court is to charge the jury that the award is not subject to income taxes. *McWeeney vs. New York, N.H. & H.R.R. Co.*, 282 F.2d 34 (1960).

It is submitted to the Court that since the decisions of the Second and Third Circuits are in accord with income tax law, their pronouncement of the law is correct and the Trial Judge was in error in this instance.

D. The Court Erred In Instructing The Jury With Reference To The Items Of Damages Which Are Recoverable In A Personal Injury Case In That There Was Duplication Of Alleged Recoverable Items And

The Instructions Were Couched In Terms Which Could Have Confused The Jury As To The Correct Standards It Had A Duty To Apply In This Regard.

In the recent case of *Dugas vs. The Kansas City Southern Railway Lines*, Number 72-2338 (February 2, 1973), the Fifth Circuit in a per curiam decision, held that there was error in the instructions given by the Trial Court in that the separate and independent items of damages mentioned by the Judge were duplications and some of these items were included in the items of damages that the Judge had already mentioned. On Page 11 the Court stated as follows:

> "The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience *including* (emphasis added) the effect of his injuries upon the normal pursuits and pleasures of life."
>
> "We think the foregoing language is significant; the effect of injuries upon the normal pursuits and pleasures of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages."
>
> "While we have found no federal case, and we have been cited none, on the subject of 'loss of vitality' we are equally certain that this item is an included element of the consequences of

> physical injury, not separately to be measured independently of the basic premise."

Using these standards by which to gauge the correctness of the District Court's instructions in this case, the instructions found on Pages 281 and 282 of the transcript used in this case by the Trial Judge are in error:

> "You should consider the following elements of damage to the extent you find them proved by a preponderance of the evidence in the case, and no other. 1) Physical and mental pain and suffering; 2) shame and embarrassment, mental anguish and anxiety, worry and concern, including feelings of economic insecurity caused by disability; income lost in the past — that is, from the time of the injury to the date of trial; impairment of earning capacity or earning ability in the future; the impairment of normal progress in plaintiff's earning capacity; and the impairment of his normal ability to enjoy the pleasures and pursuits of life."

These instructions contain duplications in the enumeration of the items of damages that can be recoverable and duplications which were prejudicial to the petitioner in this case in the following particulars. The three basic items of recovery are physical pain and suffering, mental pain and suffering and the impairment of normal ability to enjoy the pleasures and pursuits of life. These three items were set forth by the Trial Judge; but in addition, the Judge stated that the respondent could recover for "shame and embarrass-

ment, mental anguish and anxiety, worry and concern, including feelings of economic insecurity caused by disability: all of which items should be included as part of the mental suffering and accordingly submit that there was error in this aspect of the charge.

The Court then instructed the jury that they should take into account "impairment of earning capacity or earning ability in the future" and also the "impairment of normal progress in plaintiff's earning capacity" which items the writer submits to the Court are duplications in and of themselves and also are items which should have been included as part of the loss of wage factor.

Accordingly, these instructions with reference to items of damages recoverable contain prejudicial duplications which constituted an error that unquestionably had a prejudicial effect on the amount of the verdict which was completely out of line with the evidence in the case.

III. The Court Erred In Failing To Grant A New Trial And/Or Remittitur Since The Amount Of Damages Awarded By The Jury Is Grossly Excessive Under The Circumstances And Evidence Presented.

The medical testimony in this case presented by the respondent and petitioner establishes that the claimant sustained a nondisplaced fracture of the fourth sacrum, a fracture of the fifth sacrum which ultimately required its removal, a low back strain, possible fractures of some ribs which were never identified and a sprain of the costochondral joint. As of May of 1971 when Dr. Meuleman saw him the second time, approxi-

mately ten months after the accident, the plaintiff had recovered from his injuries without any residual disability and was able to return to work as a roughneck. (Tr. 124.) This was corroborated by subsequent medical examinations. There was no medical evidence to the contrary.

Under these circumstances, it is submitted to the Court that the maximum award that a jury could give under these circumstances would be TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS in general damages, approximately SIX THOUSAND FIVE HUNDRED AND NO/100 ($6,500.00) DOLLARS in loss of wages and, of course, all the medical expenses have been paid.

The amount of the verdict is unconscionable. The amount of this verdict and other shock judgments like this one are direct factors in this spiraling inflationary economy. The Courts have a non-delegable duty to reduce unconscionable verdicts for the benefit of the public at large; the ultimate payor is not the insurance company but the public who will pay for it by premiums or by the cost of goods and services. Accordingly, petitioner seeks this Court's intervention to remedy this wrong.

CONCLUSION

The case at bar presents the award by a jury of an unconscionable amount, ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 ($125,000.00) DOLLARS, for an excised coccyx, which award is attributable primarily to error in the Trial Judge's charges on damages. On Appeal, petitioners have been denied

a hearing and the case has been summarily disposed of by a singular word "affirmance." More and more the writer and other lawyers have seen the inroads at the trial and appellate levels of the concepts of justice and fairness for the quick disposition of cases sometimes irrespective of the outcome, in order to clear the crowded docket. The answer to the crowded docket is not the lessening of justice.

Petitioners submit that:

(A) The case be remanded to the Fifth Circuit Court of Appeals for "a hearing" which concept includes oral argument and personal confrontation of the lawyers and the judges and among the judges themselves;

(B) Pronouncement by this Court that the Trial Court erred in the jury charges given in the specifics set forth above and remand the case to the Fifth Circuit for a determination consistent therewith.

For the foregoing reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVIDSON, MEAUX, ONEBANE, DONOHOE, BERNARD, TORIAN & DIAZ

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PROOF OF SERVICE

I, JAMES E. DIAZ, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari on Mr. Fredric G. Hayes, Post Office Box 3285, Lafayette, Louisiana 70501, attorney for respondent, by depositing a copy thereof in the United States Mails, properly addressed to the said attorney, postage prepaid.

Lafayette, Louisiana, November ____, 1973.

JAMES E. DIAZ

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2271
Summary Calendar*

JOHN CARLYLE RICHARD,
Plaintiff-Appellee,
versus

DRESSER OFFSHORE SERVICES, INC., and
INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

(September 7, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2271
Summary Calendar*

JOHN CARLYLE RICHARD,
Plaintiff-Appellee,

versus

DRESSER OFFSHORE SERVICES, INC., and
INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(October 4, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409.

APPENDIX C

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

STATEMENT OF CICERO C. SESSIONS AT HEARING BY THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM IN NEW ORLEANS, LOUISIANA, ON AUGUST 22, 1973

I reside in New Orleans, Louisiana. I have been practicing law in this City and State continuously since 1932 except for 54 months during World War II when I was an Army Judge Advocate. I am a partner in the law firm of Sessions, Fishman, Rosenson, Snellings & Boisfontaine. For a number of years the focus of my practice has been to civil trial advocacy and appeals with emphasis on Federal court litigation. In addition to all Louisiana state courts I am admitted to practice in the United States Supreme Court, the Fifth Circuit and Second Circuit Courts of Appeals, the Court of Military Appeals, the United States District Courts for the Eastern, Western and Middle Districts of Louisiana and have appeared as a qualified visiting attorney in many other Federal and State courts outside of Louisiana.

I belong to the American, Louisiana State and New Orleans Bar Associations, the Association of the Bar of the City of New York, The Maritime Law Association, the American Judicature Society, the American Society of International Law, International Association of Insurance Counsel, the Federation of Insurance Counsel and numerous other legal professional organizations, in addition to which I am a Fellow of the A-

merican College of Trial Lawyers and a Fellow of the International Society of Barristers.

I make this statement individually and not as a representative or in behalf of any of the foregoing organizations. In discussing with your Executive Director my personal appearance and statement before you I attempted to make it clear that this statement could not be complete nor as comprehensive as I would and should like it to be because of the extreme shortness of time available to me for research and preparation. Therefore, I shall have to be brief but hopefully meaningful in what I am prepared to say today.

I discussed with Mr. Orison S. Marden his statement to you in Washington on August 3, 1973, before it was given and have studied it more carefully since then. I shall endeavor to avoid categoric repetition of Mr. Marden's postulations because I agree with them entirely and hereby endorse them fully. The same subjects, however, are tangentially involved, at the very least, with some considerations I feel it needful to advance.

I was invited to participate in a seminar on "Lawyer-Court Relations" during the Fifth Circuit's Annual Judicial Conference last April in El Paso, Texas. That subject covered appellate procedures in this Circuit which I presume to be within your Congressional mandate. At any event, some Fifth Circuit Procedures are so proximate to and intertwined with consideration of reorganization or re-alignment of the Fifth Circuit as to be indistinguishable. This omelet can't be un-

scrambled — to discuss one point requires consideration of the other and vice versa.

In preparing for the seminar I wrote on a confidential basis to a large number of trial lawyers in states of the Fifth Circuit other than Texas (which my lawyer co-seminarian Frank Harmon of Houston handled). I received a very extensive response from a number of lawyers. In most pertinent respects those responses were practically unanimous. I collated and cumulated those responses and essentially as the surrogate, as it were, of those responding attorneys expressed their consolidated opinions and criticisms during the seminar. There were no prepared speeches of the seminar, no transcription has been written but it was taped. I outlined the subjects in which my lawyer informants were interested as a foundation or predicate for my own personal participation which was not limited, however, to that outline. It is indicative, however, of the points of importance in the trial bar's thinking most of which are germane to this Commission's jurisdiction. For that reason I give that outline as follows:

"1. Assigning oral arguments in cities geographically remote from areas where the case was tried and/or where counsel are located is excessively expensive.

(a) Should the Court go on circuit or should the bar go on circuit?

(b) Why can't appeals be docketed for oral argument in cities in which the Court now sits limited to appeals from that general area?

(c) With its increased expense to the litigants, how is the present system justified?

2. What is the justification for the summary disposition of appeals without allowing oral argument?

(a) Shouldn't there be a modification to allow at least limited oral argument on applications for rehearing after summary disposition?

(b) Aren't the criteria for summary disposition too broad?

(c) Shouldn't there be an opportunity by replication, brief or otherwise, however labelled, for counsel to be allowed some measure of opposition to a proposed summary disposition of an appeal before its summary disposition?

(d) Isn't deprivation of oral argument a denial of due process?

(3) Printing of the Appendix to Briefs is an exorbitant and expensive cost in many cases.

(a) Why can't appeals be considered on the original record, as in practically all state court systems, without the heavy expense of printing the supposedly pertinent parts of the record in the Appendix to Briefs?

(b) Is such printing expense designed as an economic deterrant to appeals? If so, is that fair and

justified? If not, then what useful purpose is served better than the state courts have and why?

4. Many lawyers feel that they are penalized time-wise by no additional argument time being allowed to compensate for time consumed by questions from the bench."

Many other specific matters were discussed at the seminar. My following comments track and to some extent expand upon relevant comments made during the seminar. I claim that though made in my own way and words, in substance they evidence the thinking of the majority of the lawyers upon whose written and oral in-put I relied.

The summary docket procedures of the Fifth Circuit go too far and prejudice due process in such extensive modification or denial of oral argument. Mammoth assemblies of statistics have been made available to me which I have only had time to examine cursorily, which doubtless are in the hands of the Commission and to which I shall refer very sparsely.

I learn that today 47% of the Fifth Circuit docket consists of criminal appeals and that the majority of summary dismissals are of criminal appeals which, in the main, are frivolous, and are, from case to case, indistinguishable from one another in invalid issue involved and incisive frivolity. I pose the rhetorical question — doesn't this have to be the experience of the other circuits also? I believe it must, and thus is foundationed the next questions, which, are not rhetorical.

Has not the Congress gone too far in broadening criminal appellate jurisdiction? Isn't it overwhelmingly evident by now that it is not constitutionally necessary nor really socially necessary for there to be such gross liberality of appellate jurisdiction to the extent of jeopardizing the survival of the whole federal judicial system? To my thinking these questions answer themselves loudly in the affirmative. It is no answer to say create more judgeships and build more courthouses. That is a politically pragmatic approach which can only result in as much of a Draconian result as achieved by the Fifth Circuit's summary procedures.

It is also to be learned from the statistics that oral argument is allowed in 60% of the Fifth Circuit's civil appeals. I am unconcerned how the Fifth Circuit Local Rule 21 is explained, evaluated, parsed or justified. It boils down in any event to the proposition that 40% of its civil appeals shouldn't have been taken because they are either frivolous or unworthy of full appellate consideration and are to receive summary disposal. I simply am not persuaded the Rule 21 procedures can possibly be legitimated for the astoundingly large total of 40% of the Court's civil docket. Certainly the attorneys whose appeals have been lost without the benefit of their speeches to the Court will join me in surmising in this context a serious possibility of denial of due process in some of the civil cases comprising the 40% denied oral argument.

I have not talked to or heard, orally or in writing, from one single Fifth Circuit lawyer who does otherwise than be critical of the modification of oral argu-

ment. To put it another way, I know of no lawyer approval of the summary disposition process in its present entirety. This trend has spread to the District Courts and is being recognized and taken as another Federal judiciary step toward destruction of the adversary system of administering justice. Some District Judges in the Fifth Circuit are now denying oral argument on dispositive initial motions to dismiss or for summary judgment as a matter of course and presumably with the Fifth Circuit's summary procedures as a practical precedent. This to me is judicially presumptuous and dictatorial and only a supine bar being abdicative of its full professional obligations will put up with it. This is beyond your direct jurisdiction but philosophically and practically is a progressive result of current appellate procedures denying historically granted and perhaps constitutionally required due process procedures which are within your Congressional mandate.

Chief Judge Brown, at page 45 of his statement to the Burdick Committee, says as to summary dismissals without oral argument:

> "That Summary II's run the gamut of the Court's whole docket and do not in any sense — as too often supposed by some Judges, scholars and critics who are uninformed — represent so-called 'trash' or frivolous, worthless, wasteful cases is shown by the following subject matter breakdown for FY 1971." (Statistics omitted.)

The fact that oral argument is denied across the whole spectrum of the Court's docket in such a large per-

centage of cases as the Court's statistics show suggests that the expediencies of keeping up with the constantly increasing volume of the Court's business has been at the expense of one of the historic elements of advocacy and due process — oral argument. I for one challenge seriously that this is in the best interests of the administration of justice.

The legislative process has to take into account pertinent causes for proper result by remedial legislation. This is pertinently true as to the present work load of the Fifth Circuit and considerations of how it got that way before determining what to do about it.

The statistics show a constant, year by year progressive increase of the judicial appellate work load which directly derives, not from a Congressional expansion of appellate jurisdiction except as to criminal appeals, but from expansion of District Court jurisdiction coupled with a normal expansion of judicial business proximated by the normal population and business expansions of each state in the Circuit. The latter causes if they existed alone could hardly be causing the present judicial emergency. Elimination of three-judge court jurisdiction would effect a great saving of judicial time in the circuit courts. Restriction of class action jurisdiction would have a like beneficial effect.[1] A reversal of Congressional trend to expend

[1]See 28 U.S.C. §1407 and "Manual For Complex and Multidistrict Litigation" in conjunction with the March 15, 1972, "Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure" of the American College of Trial Lawyers.

progressively Federal judicial jurisdiction plainly would ameliorate greatly the progressively increasing judicial overload and diminish the asserted need for re-circuiting.

My analysis of Public Law 92-489, 92nd Congress, H.R. 7378, leads me to the conclusion that re-structuring and proliferating eleven judicial circuits is practically a foredrawn conclusion. I personally deplore any such intent because another alternative seems to me to be more practical and useful. I have studied the proposals made to the Commission so far as to the re-structuring of the Fifth Circuit is concerned and feel personally that none of these is usefully valid in meeting the problems of the future. Based solely on past and present statistics the Fifth Circuit is not today in actuality a collegial court as it should be, is more of an organization or rather a bureaucratic administrative organization which has a maximum number of judges and can no longer function effectively. These conclusions are apparently indisputable.

But none of the alternative proposals for dividing the circuit seems to take into account the statistical projection that in about a decade the states presently comprising the Fifth Circuit will be generating an aggregate of 30,000 appeals per annum. That, to me, means that in the less than ten years the Congress will be asked to re-circuit again. I personally am opposed to any geographical reorganization of the Fifth Circuit whatever. I have not heard nor seen any writing from anyone suggesting a plainly obvious alternative to drastic reorganization of the circuits but I cannot believe

that I could be the first or only one to think of and advance such an alternative.

This alternative is the creation of new Constitutional Article III Federal Courts each to be a United States Intermediate Court of Appeal and to be established in each state with a case load of appeals sufficient to justify respective courts of three, five or seven judges. These would *not* be mini-circuit courts. Smaller appellate volume states, such as Mississippi and Alabama combined as of today's needs, could have one such Court of Appeal for the two states combined which in the potential proliferation of judicial business therein could be split in future years. These Courts of Appeal would be layered in each circuit between the District Courts and the Circuit Court of Appeals in each circuit. General appellate and supervisory jurisdiction would be vested in the Intermediate Court of Appeal and the Circuit Courts of Appeals would become Courts of Writs and Errors with limited appellate jurisdiction. This should ameliorate the pressures on the Circuit Courts to an extent making their re-structuring unnecessary.

Such a system will be much more flexible in future years and probably no more expensive than proliferation of new circuits with all of the additional judges, facilities, personnel, etc., each of such shall need. With such a new appellate system I venture the estimate that in a few years the Fifth Circuit Court itself may find its burdens need fewer than fifteen active judges.

I understand that a couple of years ago the total cost of the entire Federal judicial system, from top to bottom and including all of its ancillary services and activities, aggregated only about $147,000,000.00 in a multi-billion dollar budget. The administration of his justice should be worth more than that to the American taxpayer, citizen and litigant, for the business, particularly the civil business, before the United States Courts belongs to him and not to the Federal Judges.

I am grateful for the Commission's courtesy and patience and thank you very much.

APPENDIX E

STATEMENT TO THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM BY SAMUEL C. GAINSBURGH, NEW ORLEANS

August 22, 1973

My name is Samuel C. Gainsburgh. My home is in New Orleans and I have been actively engaged in the private practice of law here since my admission to the Bar of the State of Louisiana in June of 1949. I was admitted to practice before the United States Court of Appeals for the Fifth Circuit on September 30, 1953, and to the Bar of the United States Supreme Court on February 9, 1955. I am a partner in the law firm of Kierr, Gainsburgh & Benjamin, an association of nine attorneys, five of whom are partners.

I am appearing before this Honorable Commission at the request of M. Truman Woodward, Jr., Esq., the current President of the Louisiana State Bar Association, but I wish it clearly understood that I do not represent that organization and that the views and observations I express are purely personal. It is my assumption that I was requested to appear by the Bar Association's president because of his knowledge that my personal practice has been predominantly in federal courts and, customarily, on behalf of plaintiffs in so-called "personal injury" matters, most often of a maritime or quasi-maritime nature. It is my hope that my selection to appear was also predicated upon Mr. Woodward's assumption that I harbor a keen interest in those matters having to do with the fair ad-

ministration of justice for all types and classes of litigants.

Needless to say, I was flattered by Mr. Woodward's request and I am, indeed, honored by your allowing me to testify on this most important subject.

It is my understanding of the function and purpose of this Commission that it desires to consider and make recommendations for changes, if indicated, in the present geographical boundaries of the several federal judicial circuits and, secondly, that the Commission desires input on the structure and internal procedures of the various Courts of Appeal in order to determine what, if any, changes therein are to be recommended for improvements designed to expedite and effectuate disposition of appeals, consistent with fundamental concepts of fairness and due process of law.

Initially, I would wish to emphasize that my experience and knowledge, if any, with judicial circuits is limited exclusively to the Fifth Circuit. I can readily appreciate that recommendations concerning alteration of the present geographical boundaries of this Circuit may, if not will, have an effect on the boundaries of the presently contiguous circuits, if not many of the others throughout the continental United States.

However, in view of my conception of the true purpose of the various Courts of Appeal and in view of my belief that the Court of Appeals for the Fifth Circuit has, with its boundaries virtually unchanged since 1891, distinguished itself so well professionally and pro-

cedurally, I must state flatly and categorically that I do not believe that any geographical alteration or combinations of geographical alterations of present Fifth Circuit boundaries or component states is either necessary or desirable.

Possessing, as it now does, the historically and culturally divergent components from west Texas to north Georgia, Alabama and Mississippi to the southern tip of Florida, it would be, in my humble judgment, difficult to conceive of a geographic area better representative of, or potentially better suited to the performance of, a heterogeneous regional unit from which to draw judges who, for all practical purposes, serve as the court of last resort for a substantial portion of the people of this great nation. (As an aside, during the course of many years of travel in connection with national bar association activities, I am constantly made aware of the esteem in which lawyers throughout this land hold the decisions emanating from our Fifth Circuit Court of Appeals.) On the subject of splitting the Circuit, or spinning off some of its component states into other circuits, I can only reiterate my personal opposition to any such suggestions.

With respect to the "structure" and "internal procedures" in the Fifth Circuit, as one lawyer reasonably well acquainted with these subjects, there are, indeed, some serious problems that virtually cry out for solution. In short, with its present complement of judges and "structure," the Fifth Circuit has, and for the foreseeable future will continue to have, a killer caseload.

From the reports and from the statistics that are available and, I am sure, have carefully been studied by this Honorable Commission, it is perfectly obvious that, but for the innovativeness and dedication of the present judges, the Court would have drowned in a sea of litigants' unreachable appeals. "Screening" and severe curtailment of oral argument have been the lifesaving measures devised and implemented just to permit the survival of the Court as a functioning institution, dealing in the business of judging.

But, like most other things, while screening and summary dispositions have their advantages, I submit to this honorable body that they also have some very grave and fundamental disadvantages — so grave that other means *must* be found and implemented so that the quality of justice is not "screened" out in order that the quantity of justice can be increased.

Without desiring to pontificate, I take the liberty of suggesting that one of the most fundamental and important functions of government ough to be to insure that the supply of high quality judging is at least equal to the demand for justice by those whose need is to be judged. Closing the courthouse door is, I respectfully submit, not a proper answer to overworked judges or overcrowded court calendars. The civilized solutions to those problems are more judges and more courtrooms.

Screening and curtailment of oral argument are, hopefully, only temporary stop-gap measures. They do not, I submit, comply with the admonition that it is

not only important that justice be done, but also that justice *appear* to have been done. Moreover, the procedure of "screening," as I understand its meaning in this circuit, lacks elements of *quality* in the business of judging that long have been regarded as important, if not essential, to appellate review: these are "oral argument" and face-to-face conferences between the "deciding" judges. There is no reason to doubt that *more* cases can be decided if *no* time is devoted to oral argument in what your figures will demonstrate is now approaching *sixty* percent of all cases considered in the Court of Appeals. There is little reason to doubt that *more* cases can be decided if there is *no* time taken for face-to-face discussion among the deciding judges. But, I submit to you that the question that we *should* ask ourselves is whether or not, under this screening procedure, more cases can be decided *correctly and justly*.

You have, as I have said, been virtually inundated with tables and figures and statistics; and I do not wish to add unnecessarily to that already formidable array of information.

But, I believe that I can at least cast substantial doubt on whether the *quality* of justice, since "screening," is as good as it was before this lifesaving measure was instituted in our Circuit.

Most lawyers, never having been judges, may well not be able to appreciate the true problems inherent in the business of judging. But, the reverse is not true, overlooking the rapidity with which some lawyers

think some judges have forgotten they were ever lawyers.

For those judges whose memories have waned and for those of you who are not members of the legal profession, may I presume to advance the suggestion that, to the lawyer whose case is on appeal, as well as to his client, it is of utmost importance that he *know* his client's position will be given full and fair consideration.

Trial courts, it has been said, search for truth; appellate courts search for error. Error, for all practical purposes, means that the trial court's judgment will not be affirmed. It will be reversed or at least modified. These are my statistics bearing, I feel, on the question of whether the Court's search for error is as diligent with screening as it was before this practice was instituted:

Year (FY]	No. of Judges	No. of Cases Judged	% Reversed
1963-64	7	828	29.5
1964-65	7	716	25.1
1965-66	9	886	24.7
1966-67	12	970	25.3
1967-68	13	1089	25.5
1968-69*	12	1279	24.8
1969-70**	15	1427	24.1
1970-71	15	1812	19.5
1971-72	15	2025	14.9
1972-73	15	2167	15.6

*Six months of "Screening"

**First Full Year of "Screening"

I believe that your tables and charts will reveal that there has been no major change in the subject matter of the appeals during the period covered by my table of statistics.

From the Court's statistics, you know that, as of the immediate past fiscal year, *fifty-seven percent* of *all* of the appellants did *not* get a hearing of *any* kind, insofar as oral argument goes. Of that percentage, thirty-three percent do not even know *why* their appeals failed because they received "Rule 21" treatment and not even a *per curiam* opinion.

But more significantly, as my table reflects, the *average* number of successful appeals for the two years *before* screening began was slightly more than one out of *four;* whereas, for the last two years, with screening now in full swing, the appellants' *average* rate of success was down to about one out of *six*. For the sake of convenience, if we use twenty-five percent for the pre-screening years mentioned and fifteen percent for the two current screening years, the plain mathematical result is that our judges are able to discern forty percent *less* error when they look at appeals through a screen than when they were examining them in the cold light of oral argument and post-argument face-to-face conferences.

Let me hasten to say that the foregoing is not to be construed as criticism of the judges or anyone of them. I have, I dearly hope, already said and re-said that, in view of the present complement and structure of the Court, screening was necessary — it was, in-

deed, lifesaving. But I think that the figures that I have been presumptuous enough to offer at least support the inference, if they do not compel it, that when any human being, even a United States Circuit Judge, is required to do more than is humanly possible he cannot do the same quality of work that he would do if he were only asked to work within his human limitations. Fifty percent justice is still, however, fifty percent injustice.

What, then, may offer some assistance to this Commission in restoring to our Fifth Circuit the highest quality of justice that man is capable of dispensing?

I am aware that there is a firm and, perhaps, well founded opposition to increasing the number of judges of the Court. It will be, if it has not already been, suggested that there is something ideal about the number "nine" for appellate court optimum performance. Never having been a judge, I certainly cannot argue that point, except to say that for more than seven years now the Court has been functioning with a *greater* complement of judges.

As an outsider, however, it seems quite clear to me that the Court's caseload rather naturally divides itself into two major categories of cases, namely, criminal and civil. As an inquisitive outsider, I have reason to believe that the Office of the Clerk is presently already somewhat departmentalized along these same lines.

My effort, then, at making a constructive suggestion to this honorable body is to pose this question: Why not create, within the present parameters of the Circuit (and, perhaps, any other Circuit having similar problems to those of the Fifth) a United States Court of Criminal Appeals for the Fifth Circuit? Let it have its own complement of Article III Circuit Judges chosen, hopefully, for their expertise in the field of criminal law, with a staff of *career* para-judicial personnel adequate to maximize the time devoted by all of the judges to their business of judging, including resolving their intra-circuit conflicts with their own *en banc* procedures, within the two divisions of the Court. In summary, I suggest consideration be given to dividing the Court, rather than the circuit, and that the division be made along lines that seem, to me anyway, both natural and logical — along lines of subject matter rather than of geography.

In conclusion, may I express my appreciation again for the opportunity of participating in these proceedings.

Supreme Court, U. S.
FILED
DEC 26 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1002

JOHN CARLYLE RICHARD,
Respondent,

versus

DRESSER OFFSHORE SERVICES, INC.,
Petitioner.

JOHN CARLYLE RICHARD,
Respondent,

versus

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JAMES E. DIAZ
Davidson, Meaux, Onebane, Donohoe, Bernard, Torian & Diaz

Attorneys for Petitioner,
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 73-2271
Summary Calendar

D. C. Docket No. CA-16-568

JOHN CARLYLE RICHARD,
Plaintiff-Appellee,
versus

DRESSER OFFSHORE SERVICES, INC. and
INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

September 7, 1973

Issued as Mandate: Oct. 12, 1973

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IN THE

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OCTOBER TERM, 1973

NO. 73-1002

JOHN CARLYLE RICHARD,
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INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

REPLY BRIEF ON BEHALF OF JOHN CARLYLE RICHARD

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INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

REPLY BRIEF ON BEHALF OF JOHN CARLYLE RICHARD

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit has denied respondents due process of law by disposing of the issues involved in this case under that court's rules 18 and 21.

2. Whether grave and prejudicial errors were made by the trial judge in the instructions to the jury with reference to elements

of comparative negligence, future loss of earnings and items of general damages.

3. Whether the Court of Appeals for the Fifth Circuit erred in failing to enter a remittitur to reduce the jury verdict.

RULES OF COURT INVOLVED

Rule 51 of the Federal Rules of Civil Procedure provides as follows:

RULE 51. INSTRUCTIONS TO JURY: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

In this case, complainant, John C. Richard, fell from an unlighted derrick, and is stipulated to have been a seaman at the time of his fall.

Richard produced evidence which showed that at the time that he fell the lights in

the derrick had failed, that the electrician hired by the company and maintained on board would not climb to repair the lights, and that he was injured in the course and scope of his employment when ordered to ascend into darkness to attempt to repair the defective equipment.

The jury rendered a verdict for Richard. The jury found the complainant was 10 per cent contributorily negligent and the defendants were given credit by counsel in the final judgment for $3,696.00 paid to Richard at the rate of $56.00 per week until terminated. It was stipulated complainant had achieved maximum cure before the case went to the jury and a separate judgment for unpaid medical was made.

These facts are not disputed, and the defendants filed a motion for directed verdict at the end of Richard's case, and at the end of defendants' evidence, on the basis of the failure on the part of Richard to prove any breach of warranty of unseaworthiness which was a proximate cause of the accident, and failure to prove negligence. (Tr. 223)

The defendants then filed a motion for judgment notwithstanding the verdict and alternatively for new trial and/or remittitur upon the same propositions of law. These were denied by the Trial Court, after opposition thereto was filed.

The evidence is undisputed that at the time Richard fell, the lights on the vessel had gone out, and that as Richard fell in the middle of the night, it must be concluded that he fell in darkness.

The jury returned a verdict of $125,000.00, but found that Richard was 10 percent negligent,

reducing that verdict by 10 percent.

The defendants filed a motion for a new trial and then filed a supplemental motion for new trial and/or remittitur.

All of these motions were denied by the Trial Court who sustained the verdict of the jury.

The defendants appealed to the Fifth Circuit.

By motion of the Fifth Circuit the matter was placed on the summary docket and the jury verdict was again affirmed.

The defendants have made application for certiorari based upon the alleged denial of "due process of law" because defendants' counsel was denied oral argument, which Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L. Ed. 1356 (1948) declared was not required by due process.

Defendants also contend that errors were made by the Trial Court in the instructions to the jury, with reference to elements of comparative negligence, future loss of earnings and items of general damages, but did not follow Rule 51 of the Federal Rules of Civil Procedure in stating distinctly the matter to which they objected and the grounds of the objection prior to the jury verdict.

The third argument is that the jury verdict should be reduced because the defendants feel it is excessive in view of their doctor's testimony, on a disputed question of fact, the disability and/or pain and suffering of the plaintiff, which question of fact the jury found in plaintiff's favor.

I. PETITIONERS FOR CERTIORARI HAVE NOT BEEN DENIED DUE PROCESS OF LAW BECAUSE THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, DID NOT ALLOW DEFENDANTS' COUNSEL ORAL ARGUMENT.

Petitioners for certiorari assert that they have been denied due process because of the failure of the United States Court of Appeals, Fifth Circuit, to hear the oral argument of the counsel for the petitioners.

Petitioners cite as their authority a 1952 decision of this Court, United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, which concerned the actions of a trial court judge in a criminal case in relation to an application for a writ of habeas corpus.

As Honorable Warren E. Burger pointed out on August 6, 1973 in his report on the Federal Judicial Branch, the business of the Courts of Appeals has increased well beyond the increase in judges, there being more than 15,000 appeals filed in the current year.

The Chief Justice went on to point out that several Circuits have disposed of as much as 60 percent of the appeals without oral argument as an experiment imposed by necessity:

> "The business of the United States Courts of Appeals, like that of the District Courts, continues to increase well beyond the increase in judgeships. In 1963, there were 5,400 cases filed, and in the current year, there were more than 15,000. To meet this avalanche of appeals, many courts of appeals have experimented with screening of cases to identify those not meriting oral argument.

> "In the year just ended, several circuits have disposed of as much as 60 percent of the appeals without oral argument and often without opinions. It is not surprising that with criminal appeals available at public expense to every convicted indigent defendant, most of them take appeals. With the enormous pressures on courts of appeals, there is risk that, in a screening process, some nonfrivolous appeals having arguable merit may be denied oral argument and some less worthy cases may receive it.
>
> "The screening of appeals has been frankly an experiment imposed by necessity. Circuit judges have considered this process imperative to keep abreast of their work." 94 S.Ct. Prefix, Page 7

Petitioners for certiorari have cited no prior decisions setting forth that there is a right to oral argument by counsel in all cases.

The United States Supreme Court in 1948 considered the question raised by a defendant in a habeas corpus proceeding that he had been denied "due process" by failure to allow him to make oral argument on appeal.

The Court, speaking through Justice Murphy, in Price v. Johnston, 334 U.S. 266, 92 L.Ed. 1356, 68 S.Ct. 1049 (1948), expressly held that oral argument on appeal is not a requirement of due process:

> "Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates.

"A prisoner's right to participate in oral argument on appeal is accordingly to be determined by the exercise of the discretionary power of the circuit court of appeals under Section 262." Price v. Johnston, 334 U.S. 266, page 286, 92 L.Ed. 1356, 68 S.Ct. 1049, page 1060 (1948).

The case of United States v. Hayman, supra, specifically concerned a hearing in connection with an application for habeas corpus hearing, and specifically concerned the conduct of the trial judge. In the decision cited above, Price v. Johnston, supra, the Court specifically held that the petitioner for habeas corpus was not entitled to oral argument on appeal as an essential ingredient of due process, and, moreover, specifically held that the question of oral argument properly addressed itself to the discretion of the Court of Appeals.

As was pointed out by the Chief Justice, cited above, several circuits have disposed of as much as 60 percent without oral argument primarily due to the fact that the business of the United States Courts of Appeals continues to increase well beyond the increase in judgeships.

Both counsel for plaintiff and defendants made argument to the jury in this matter, and the jury decided the case in favor of the plaintiff after hearing oral argument from both sides in the trial court.

United States v. Hayman referred only to trial court proceedings, and Price v. Johnston specifically held that oral argument on appeal is not an essential ingredient of due process.

II. NO ERROR WAS MADE BY THE TRIAL COURT IN REFUSING TO GIVE THE INSTRUCTION SUBMITTED BY THE DEFENDANTS.

The defendants herein failed to state the matter to which they objected and the grounds of their objection as to jury instructions prior to the time that the jury rendered its verdict.

The failure to state the grounds of any objection is fatal to the defendants' attempt to obtain a new trial or appeal on matters first listed by brief of counsel following the rendition of the verdict by the jury.

Rule 51 of the Federal Rules of Civil Procedure provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The defendants failed to object to the Court's charge and give any reasons for their objection.

The defendants failed to request any charge to the jury that the jury should not consider future pain and suffering or future disability of the plaintiff and did not object prior to the verdict being rendered to the Court's charge in this respect.

The defendants are estopped from now asserting a claim or erroneous instruction to the jury because of the fact that the defendants' counsel himself drew the interrogatories as to the question of damages which was submitted to the jury:

"INTERROGATORY NO. 5:

What is the total amount of money, paid in cash today that will fairly and reasonably compensate plaintiff for the injuries he suffered, it any, proximately resulting from the alleged accident of July 15, 1970?

Answer in figures: ANSWER: $_____"

Norris, The Law of Seamen (Third Edition) points out:

"A charge of error on the part of the trial judge in giving or in failing to give an instruction cannot be raised for the first time on appeal. The aggrieved party must, at the trial, object thereto before the jury retires to consider its verdict. The objector must state distinctly the matter to which he objects and the grounds of his objection."

Citing: Rule 51, Fed. Rules of Civ. Proc. See also: Li Mandri v. Brasileiro, 316 F2d 3, 1963 AMC 2335 (CA6 Tenn 1965).

"The burden is on the appellant of showing that the findings of the trier of fact are clearly erroneous. When the burden of going forward with the proof had been placed on the defendant (or appellee) and the defendant had failed to carry the burden, it was held on appeal to be error to find in favor of the defendant on the issue of cause in fact.

"It has been held that while the "clearly erroneous" rule applies in admiralty, this principle applies with less force where most of the evidence is in the form of depositions and the District Court did not have the opportunity to observe those witnesses.

"A charge of error on the part of the trial judge in giving or in failing to give an instruction cannot be raised for the first time on appeal. The aggrieved party must, at the trial, object thereto before the jury retires to consider its verdict. The objector must state distinctly the matter to which he objects and the grounds of his objection.

"An order holding that a claim based on negligence under the Jones Act is time-barred is an appealable order.

"A Jones Act suit tried in the federal district court will, as to appellate review, be controlled by the appropriate rule of procedure that the findings of fact of the trial judge should not be set aside unless clearly erroneous.

"If the judgment in the lower court is supported by substantial evidence and on viewing the whole case the appellate court cannot say that an injustice has been done -- in the absence of reversible error then the judgment will be affirmed. On disputed questions of fact the verdict of a jury will be treated as controlling for even if the question is a close one that fact will not justify either the trial judge or the reviewing court in usurping the function of the jury. Questions of negligence should under proper charge from the trial court be submitted to the jury for their determination.

"When there is sufficient evidence for a jury to consider on the question of negligence, its verdict should not be set aside by a trial judge or an appellate court.

"The test is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

As pointed out in 66 C.J.S., Section 37, the defendants must object to alleged misconduct at the time, but here, no objection was made whatsoever to the charges given by the Court nor to the argument of plaintiff's counsel that the jury might consider loss of wages, future pain and suffering, and such objection must be made at the proper time or is waived even if the defendants were not estopped to assert such an objection at this point in view of Interrogatory No. 5 which was prepared by the defendants' counsel and submitted to the

jury on his motion.

ANSWER TO POINT A:

The Court Properly Refused Defendants-Appellants' Instructions With Reference To Contributory Negligence Because The Charge Was Not Sustained By Law. *

The defendants-appellants submitted the following instruction to the Court:

> "Plaintiff was obliged to make reasonable use of his faculties and senses to observe and avoid danger, and he must be presumed to know what the ordinary use of his faculties would make apparent to him. His failure to observe or avoid any such danger that is observable and avoidable constitutes contributory negligence on his part. Honoy v. Harding, 300 F.Supp. 696 and 699; Ellington v. American Mail Line, Ltd., et al, 163 F.2d 133; Naigle v. Isprantesen Company, Inc., 177 F.2d 163 (2nd Cir. 1949)."

The decision of Nagle v. Isbrandtsen Co., Inc. (2nd Cir. 1949) contained only the language which is underlined (at 177 F.2d page 164) which was sustained as a proper charge by the judge. The balance of the instruction is not contained in the Nagle case and the other cases cited do not exist at the pages cited, are not cited in the Nagle case, and do not appear in any table of cases that counsel is able to find.

Since this charge did not state the law, and particularly instructs the jury that Richard's failure to observe or avoid danger constituted contributory negligence, a question of fact to be determined by the jury, it

was property denied by the Court.

Moreover, no reason for objection to the denial of this charge was made by defendants' counsel and under Rule 51 of the Federal Rules of Civil Procedure, the denial of the instruction cannot be used as the basis for a motion for new trial or considered on appeal, by virtue of the failure of the defendants' counsel to make objections, stating reasons, as required by Rule 51.

As stated in Gorsalitz v. Olin Mathieson Chemical Corporation, 429 F.2d 1033 (1970):

> "After the jury retired, defendant Olin's counsel stated that while he agreed with the first part of the charge relating to burden of proof, he objected to the remainder of the instruction, but stated no grounds for his objection. Thus, under Rule 51, Fed.R.Civ.P., Olin has not preserved for review its objection to the Court's instruction to the jury."

ANSWER TO POINT B:

The Court Did Not Err In Its Charge To The Jury With Respect To Future Loss of Earnings And Impairment of Earning Capacity. *

The defendants objected to the instructions as to future impairment of earning capacity and future loss of wages after the jury instruction had been given (Tr. 290). In an abundance of caution, the Court further instructed the jury as follows (Tr. 291):

> "If I have said during my charge that I have given you anything that is in conflict with what you understand the

> evidence to be, you are completely free to disregard what I have said in regard to the facts. But you must remember what I told you in regard to the law, and apply that law to the facts as you find them to be in the case.
>
> "In my general charge I may have said or, during the course of that charge, referred to certain principles of law that don't have any application to the facts in this case, and if you find that to be true, ignore, or don't consider that portion of my charge."

Prior to that time, the Court had instructed the jury specifically (Tr. 267):

> "The plaintiff need prove his case only by a preponderance of the evidence. He need not produce every possible witness, and he need not prove his case beyond a reasonable doubt, as is necessary in criminal cases. But speculation, mere possibility, and even unsupported probability is not sufficient to support a judgment in his favor."

The defendants contend that there was no evidence to sustain a finding of impairment of wages. The evidence did exist from the uncontradicted work record of Richard, which was introduced by stipulation of counsel, and by the testimony of Richard, that he was presently working for $75.00 per week, whereas his salary with Dresser at the time of injury was approximately $274.00 per hitch (TR. 55). This evidence was in no way contradicted.

The Fifth Circuit, in Stockton v. Altman, 432 F.2d 946, at page 950, set forth the rule it would follow with respect to "sufficiency" of evidence:

> "This Court in considering a sufficiency question is required to accept all evidence in favor of the verdict as true and to give that evidence the benefit of all permissible inferences that help sustain the jury's decision. Lyle v. Bentley, 5th Cir. 1969, 406 F.2d 325; Southern Pacific Co. v. Jordan, 5th Cir. 1968, 395 F.2d 209; Employers Mutual Casualty Co. v. Mosqueda, 5th Cir. 1963, 317 F.2d 609. When these standards are applied to the case at bar it becomes quite apparent that there is indeed sufficient evidence to sustain the controverted answers and verdict."

The testimony of Richard as to his loss of earnings at present was undenied, and he testified he was disabled and unable to continue his former occupation.

It must be remembered also that the parties stipulated that maximum medical cure had been reached.

The defendants further stated that the opinion of Dr. William Meuleman should have overridden all else in the jury's mind.

The jury had ample opportunity to determine the credibility of this witness, and the Fifth Circuit specifically held in 1959:

> "The jurors were not, however, bound to accept the opinion of defendant's expert witnesses, but had a right to

use their own common sense and experience and to draw all reasonable inferences from the physical fact and occurrences." Seaboard Surety Company v. First National Bank of Montgomery, 263 F.2d 868, at page 871, (5th Cir. 1959).

ANSWER TO POINT C:

The Court Properly Refused To Give Defendants-Appellants' Instruction With Reference To The Award Not Being Subject To Federal And State Taxes. *

The defendants admit that the Fifth Circuit Court of Appeals has held their requested charge 14 improper in the case of Cunningham v. Bay Drilling Company, 421 F.2d 1398:

"The second complaint appellant makes is to the court's refusal to give a charge instructing the jury that any award for damages would not be subject to payment of federal or state income taxes. We believe the refusal was proper. Prudential Insurance Company of America c. Wilkerson, 5th Cir. 1964, 327 F.2d 997; Payne v. Baltimore and Ohio Railroad Company, 6th Cir. 1962, 309 F.2d 546, cert. denied, 374 U.S. 827, 83 S.Ct. 1865, 10 L.Ed.2d 1051; Cunningham v. Rederist Vindeggen A/S, 2nd Cir. 1964, 333 F.2d 308." Cunningham v. Bay Drilling Company, 421 F.2d 1398, p. 1399 (5th Cir., 1970)

The defendants requested Special Charge 14:

"If you award damages to plaintiff, the damages awarded are not subject

to payment of federal or state income taxes." (Tr. 29, line 14)

The trial court refused all requested special charges to the jury by plaintiff and defendants,(Tr. 227), and there was no objection to the Court's charge to the jury as to 14 by the defendants except:

"We also object to the Court's failure to charge No. 14, defendants' No. 14 with reference to taxes. I recognize there is a split, and the Court of Appeals' decision in the Fifth Circuit has disallowed it, but I would like to reflect that point." (Tr. 289, lines 1 through 5)

In each of the decisions cited by defendants in brief the jury was not charged as to taxes and the jury verdict was sustained.

In Cunningham,supra, the Fifth Circuit cited Payne v. Baltimore and Ohio Railroad Company, 6th Cir., 1962, 309 F.2d 546, in which case certiorari was denied, 374 U.S. 827, 83 S.Ct. 1865, 10 L.Ed. 1051 (June 17, 1963).

In that decision, the Court decided not to instruct the jury as to taxes and sustained a jury verdict of $136,267.23:

"The remaining question concerns the requested and refused instruction to the effect that any award to plaintiff would not be income to her for Federal income tax purposes, that the jury should not add to nor subtract from any award on account of Federal income taxes. The case of New York

> Central v. Delich, 252 F.2d 522 (6 Cir., 1958) is one in which this Court specifically held that refusal to give such a charge was not error. We are not persuaded that any of the cases cited and discussed by appellant in its briefs stands for a contrary holding. The failure to give the charge does not constitute reversible error." Payne v. Baltimore and Ohio Railroad Company, 6th Cir., 1962, 309 F.2d 546, at pp. 549, 550.

In the Domeracki decision, cited by defendants, the Third Circuit Court of Appeals sustained a jury verdict of $270,982.00 in favor of a longshoreman, holding that there was no reversible trial error in failing to instruct the jury:

> "I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law..." (443 F.2d 1245 at pp. 1248, 1249)

and promulgated a rule for prospective application in that Circuit only:

> "We decline, however, to reverse the judgment of the court below. Two important considerations influence this determination. First, the purpose of the rule which we promulgate for prospective application in this Circuit is to remove the possibility that juries will increase awards based on mistaken considerations of tax consequences. In the case at bar, however, there is no evidence that the jury was in fact so motivated, and because of the settled rule, heretofore discussed,

that the sanctity of jury deliberations may not be invaded subsequent to the rendition of the verdict, any inquiry is now foreclosed.

"Secondly, we recognize that our approach to this problem represents a new view in this judicial circuit as well as in other Circuits. Indeed, the position we adopt has been accepted by only a handful of state jurisdictions. In this situation, it cannot be said that the trial court erred in refusing the instruction at the time it was proffered. Paying even the most scrupulous attention to the sometimes subtle shifting of appellate winds, the district court could not have been expected to forecast the decision we reach here.

"In conclusion, after considering all the arguments presented by appellant, we hold that there was no reversible trial error. Moreover, we cannot say that the amount of the verdict shocks the conscience of the court.

"The judgment of the district court will be affirmed." Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, at p. 1252 (3rd Cir., 1971) Cert. den., 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165, Oct. 19, 1971.

In the McWeeney case, the Second Circuit Court of Appeals sustained a jury verdict of $87,000.00 and specifically held that the failure to instruct the jury that the jury "was not to add any sum to the verdict on account of federal or state income taxes,

since the amount awarded to the plaintiff by your verdict is not taxable income to the plaintiff within the meaning of these tax laws" (Charge 17) and the failure to instruct the jury "If your verdict is in favor of plaintiff, you must calculate any past or future loss of earnings on the basis of his net income after deduction of income taxes" (Charge 18) was not reversible error:

> "We do not think so. The requested instruction was that the jury should not add something to the recovery because of a factor for which the plaintiff had never suggested it should. Before an appellate court should hold that failure to give such a cautionary instruction was reversible error, there ought to be evidence either that juries in general increase recoveries on this account or that the particular jury did so. The published material on the former point is too slender to support a judgment that juries do this generally, and there is nothing to suggest that this one did. McWeeney had incurred medical expenses of $10,305 (only $2,065 of which was challenged in any way), had sustained and would sustain pain and suffering, had lost some $14,000 in earnings up to the date of the trial, and had a future earning potential which, discounted on the basis that the judge charged without objection, was nearly $100,000. Under these circumstances, a verdict of $87,000 affords no indication that the jury included an allowance for income tax that McWeeney would never have to pay. To be sure, one may speculate that the jury may have found McWeeney guilty of contributory negligence or may not have

> believed his testimony as to total disability, and therefore first reduced the amount and then increased it for the non-existent income tax liability; but this is sheer conjecture and no such claim was advanced in support of defendant's motion for a new trial. The accident occurred over four years ago; the case was tried before an experienced judge of the most scrupulous fairness; and we see no sufficient reason for ordering a new trial because he declined to give a cautionary instruction when there is nothing to indicate that one was needed.
>
> "Judgment affirmed." McWeeney v. New York, New Hampshire and Hartford R. R. Co., 282 F.2d 34, at pp. 39, 40 (2nd Cir., 1960)

ANSWER TO POINT D:

The Court Did Not Err In Instructing The Jury With Reference To The Items of Damages Recoverable In A Personal Injury Case. *

The defendants contend there was a duplication in the charge to the jury of alleged recoverable items, but also admit that this question was not properly raised, and in fact was not raised until defendants filed a supplemental alternative motion for new trial on March 1, 1973, which motion should have been filed within ten days after judgment, under Rule 59(b) and 59(e) of the Federal Rules of Civil Procedure in force at the time, and which motion was filed after the motion for new trial was submitted to the Court on February 7, 1973, as set forth in Richard's opposition.

The law further declares that an amended motion providing additional grounds for new trial, filed after ten day period for service of motion for new trial need not be considered. U. S. V. 205.03 Acres of Land, More Or Less, in Warren County, State of Pa., D.C. Pa. 1966, 251 F.Supp. 858. See also, Pruett v. Marshall, C.A. Ala. 1960, 283 F.2d 436; Marks v. Philadelphia Wholesale Drug Co., C.A. Pa. 1955, 222 F.2d 545; Francis V. Southern Pac. Co., C.C.A. Utah 1947, 162 F.2d 813, affirmed 68 S.Ct. 611, 333 U.S. 445, 92 L.Ed. 798; Jackson v. Baldwin-Lima-Hamilton Corp., D.C. Pa. 1966, 252 F.Supp. 529, certiorari denied 87 S. Ct. 189, 385 U.S. 803, 17 L.Ed. 117; Baird v. Aluminum Seal Co., D.C. Pa. 1956, 149 F.Supp. 874, affirmed 250 F.2d 595; Marks v. Philadelphia Wholesale Drug Co., D.C. Pa. 1954, 125 F.Supp. 369; Schuyler v. United Air Lines, D.C. Pa. 1950, 94 F.Supp. 472, affirmed 188 F.2d 968; Cheffey v. Pennsylvania R.R. Co.,D.C.Pa. 1948, 79 F.Supp. 252; McHugh v. Audet, D.C. Pa. 1947, 72 F.Supp. 394; Brest v. Philadelphia Transp. Co., D.C. Pa. 1959, 24 F.R.D. 47.

The case of Dugas v. The Kansas City Sou. Rwy. Lines, 473 F.2d 821 (5th Cir., February 2, 1973) was decided after the Richard trial was held and the jury rendered its verdict on December 17, 1972.

It is submitted as a basic premise of law that an appellate decision rendered after the trial court jury verdict cannot be used in hindsight to overturn the jury verdict for the reason that the trial court did not instruct the jury properly because of an appellate decision handed down more than a month after the jury rendered its verdict.

Moreover, as has been previously set forth in this brief, the defendants did not object to the charge to the jury under Rule 51 of the

Federal Rules of Civil Procedure and seek now to use a later appellate case to assert error in the charge. In the Dugas case, the defendants' counsel made the proper specific objection under Rule 51:

> "When the charge was completed, the railroad objected, as follows:
> "In the charge where the Court charged that in the elements of damages recovery could be had on mental anguish and for loss of enjoyment of life and then recovery for physical impairment and loss of vitality, I think really they are one and the same, but the way the charge was given it sounds like there are a total of four elements involved, ..." Dugas v. The Kansas City Sou. Rwy. Lines, 473 F.2d 821 (5th Cir., February 2, 1973) at p. 827.

The Court concluded a $200,000.00 verdict was not excessive.

Moreover, it is submitted that the instruction of the Judge given after objection by counsel was noted, more than cures any defect as to separate and independent items of damage:

> "In my general charge I may have said or, during the course of that charge, referred to certain principles of law that don't have any application to the facts in this cawe, and if you find that to be true, ignore, or don't consider that portion of my charge." Page 27, Charby by the Court to the Jury.

It is submitted that the questions of fact raised by the defendants in their motion for new trial should properly, and were properly,

determined by the jury. Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 174 (1959).

In the decision cited by appellants of Dugas v. The Kansas City Sou. Rwy. Lines, supra, at page 826, the Fifth Circuit declined to reverse an alleged error not presented to the trial court, citing Dennis v. Central Steamship Corporation, 5 Cir., 1972, 453 F.2d 137, 141.

Moreover, the instruction which the appellants requested of the Court was that the Court instruct the jury that the question of future earnirgs was not an issue which was before the Court. (Tr. 289, 290)

ANSWER TO POINT III:

The Decision Of The Trial Court In Refusing To Grant A New Trial Or Remittitur Should Not Be Disturbed.

In this case, the trial court properly refused to set aside the jury verdict rendered in favor of Richard. This verdict was rendered after trial of the case and the defendants raised only the points that Richard failed to prove negligence and/or had failed to prove unseaworthiness in the motion for a directed verdict. All other issues have been raised by the defendants after the case was submitted to the jury, the defendants objecting to the failure to give its requested instructions as to income tax and contributory negligence not being raised in accordance with Rules of Civil Procedure, and the only other request from the defendants being that "the Court should instruct the jury that these issues are not before the Court" (Tr. 289) with reference that there were incompetent or too few men assigned to the task (which issue is not continued in

appellants' brief) and that there is no evidence in the record that substantiates any issue with reference to impairment of earning capacity or future loss of wages, which the Court ruled raised a question of fact for the jury.

All other issues have been raised following the submission of the case to the jury, and should not be considered on appeal. Dugas v. The Kansas City Sou. Rwy. Lines, 473 F.2d 826.

The Supreme Court held in the case of Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 540 (1944):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review in the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDada, 135 U.S. 554, 571, 572, 10 S.Ct. 1044, 1049, 34 L.Ed. 235; Tiller v Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S.Ct. 451, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354,

> 63 S.Ct. 1062, 1064, 87 L.Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." (Cited by the Fifth Circuit in Cities Service Oil Company v. Launey, 403 F.2d 537 (1968) at page 540).

The Fifth Circuit further declared that it would follow the substantial evidence rule in the case of Laird v. Hudson Engineering Corporation, 449 F.2d 216 (5th Cir. 1971), to the effect that the evidence would not warrant interference by the Court of Appeals in the trial judge's discretionary decision to deny remittitur. The sufficiency standard is set forth in Stockton v. Altman, supra.

The Fifth Circuit has further held that the use of state court decisions is not a proper method to be used by a jury in a Federal court trial and the question is one to be determined by Federal law:

> "In determining the sufficiency of the evidence to raise a question of fact for the jury in diversity cases, federal courts must apply a federal test. Planters Manufacturing Co. v. Protection Mutual Insurance Co., 380 S.2d 869 (5th Cir. 1967). Precedents with varying factual situations are, of course, helpful, but almost no case is a precise replica of another, so the court, in each case, must determine whether, under the particular facts of that case, the issue of

negligence or contributory negligence presents a question of law for the court or one of fact for the jury. See Texas & Pacific Railroad Co. v. Laborde, 257 F.2d 587, 590 (5th Cir. 1958)."

The defendants have been unable to cite any case in which surgical removal of the coccyx and fracture of the sacrum was involved. Richard testified, without contradiction, that he had lost $200.00 per trip wages, and that he was totally and permanently disabled and unable to return to work in his former occupation.

This was corroborated by the testimony of his wife, and also by his work record, which was introduced by stipulation.

It is respectfully submitted that at the time of the trial Richard, by the stipulated admissions of work record and earnings prior to injury, had sustained a loss of wages of $25,000.00.

The admission of the hospital records, by stipulation, which were read to the jury upon insistence of defendants' counsel, clearly shows the pain and suffering which Richard sustained.

An examination of the cases cited by the defendants for the proposition that medical testimony must be adduced to show that such pain would be permanent is clearly distinguishable from the case at bar, since in this case removal of the tailbone and fracture constituted objective proof of injury as did the scars and surgical remedial intervention which were stipulated by defendants' counsel.

As clearly set forth in the cases cited by

the defendants, the proof of objective complaints does not require additional substantiation by medical testimony as does the case of purely subjective claim.

In addition to this, the Federal Courts have repeatedly held that such opinion invades the province of the jury, to determine the ultimate question of whether the plaintiff has been permanently disabled:

> "The jury's power to draw the inference that the aggravation . . . was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes.
>
> "The matter does not turn on the use of particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration." Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, at page 175.

The cases cited by the defendants concern subjective complaints and the law is well settled that where the injury is objective in nature, as here, where the tailbone has been physically removed by surgery, the permanent nature of the injury may be shown by the evidence of the objective injury and the testimony of the plaintiff.

The full paragraph set forth in 20 AmJur. Section 778, recognizes this rule:

> "The question of the necessity of expert evidence to warrant submission to the jury of the issue as to the permanency of an injury or as to future pain or suffering depends, in a large measure, upon the character of the injury involved, whether it is subjective or objective. Where the injury may be characterized as one of an objective nature and it is plainly apparent from its nature that it will be permanent or that the injured person will necessarily undergo pain and suffering in the future, the presentation of expert testimony is not essential; in such cases it is proper for the jury to pass upon such question without the aid of medical or other expert testimony. On the other hand, where the injury is subjective in character and of such nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, the courts generally require the introduction of competent expert opinion testimony bearing upon the permanency of such injury or the likelihood that the injured person will endure future pain and suffering before allowing recovery therefor. Some courts have held that expert testimony as to the permanency of an injury or as to future pain and suffering is not required under the circumstances involved, without expressly stating that the injury involved was of an objective character."

It is also recognized that testimony of other persons as to the pain and suffering

which the plaintiff sustains is admissable, as in this case, the plaintiff, his wife, and the doctors all testified that John Richard has continued to complain of pain, has given evidence of pain during medical examinations, and has continued to take pain pills.

It is, therefore submitted that the question of the permanence of the injury cannot now be attacked in view of the failure of the defendants' counsel to object to the Court's charges or to offer a verdict for submission that no judgment could be rendered for future pain and suffering as was done in the State court cases cited by defendants' counsel.

Moreover, the testimony of Dr. Meuleman substantiated the objective finding that the coccyx has been removed, and that as the result of the injury and subsequent operation, it is medically possible for Richard to continue to suffer pain. Dr. Meuleman also testified that Richard reached maximum medical recovery in October, 1971, from which it must be inferred that his pain and suffering is permanent in nature.

Defendants' doctor, Dr. Meuleman, completely skirted the question of disability on his examination by the Court, merely repeating that in his opinion the man could return to work:

"Q. All right, sir. Now, at the examination in October of 1971, did he make complaints of pain?

A. Yes, sir, he did.

Q. Did he make complaint of tailbone pain?

A. Yes, sir.

Q. Did he make complaint as to his leg muscles?

A. Yes, sir.

Q. If he would turn or twist suddenly.

A. Yes, sir, he mentioned that if he turned or twisted suddenly why then he'd get knotting, as he described it, with his leg muscles.

Q. Now, you saw him again approximately a year later, in October, 1972 ---

A. That's correct, sir.

Q. ---is that correct, sir?

A. That's correct, sir.

Q. Did he make any complaints at that time?

A. Essentially the same complaints.

Q. He complained of pain in the tailbone?

A. Yes, sir.

Q. He complained of pain in the low back?

A. Yes, sir.

Q. He complained of weakness of the legs?

A. Yes, sir, he complained of all of these things, and he also mentioned the pain factor along the inner aspect of the left thigh, which was the site of the laceration.

Q. Now, did you make a report at that time?

A. Yes, sir, I reported it, in time, to

Mr. Diaz, who referred the man for evaluation.

Q. In your report, did you state that he still had the same complaints on the seated sciatic tension test of hamstring tightness?

A. Yes, sir, I did.

Q. This is from the first that you had seen him?

A. I beg your pardon?

Q. This is from the first that you had seen him, until October of 1972?

A. Yes, sir.

Q. Same complaints?

A. Yes, sir.

Q. You also stated that there was general soreness in the lumbar spine upon palpation.

A. Yes, sir, I did.

Q. And this is the same complaint which he has had since you first saw him?

A. Correct.

Q. And he also complained of tailbone pain, although the tailbone has been removed.

A. That's correct, sir.

MR. HAYES: I have no other questions.

COURT: Doctor, let me ask you this questio

Is it -- can you state or give us

your opinion when -- from a standpoint of your own medical experience and knowledge, when did Mr. Richard reach maximum medical recovery from his injuries, it he has reached it?

A. It would be my personal opinion that as of May of '71, there was no question in my mind that this young man was capable of returning to work.

COURT: That's not my question. When had he reached maximum possible medical recovery from the injury, not whether or not he could return to work.

A. I see. I believe I'd state it the same way, sir.

COURT: May ---

A. May of '71." (Tr. 141-144)

Dr. Meuleman went on to point out in his testimony that there are many things which can cause pain in a scar and that he had no explanation for the continuance of pain, but did point out, as he had done earlier, that different persons produce different pain and that all backs are different:

"Then you take into account other things that can cause pain in a scar -- where it is in relation to other structures. In it in relation to, say, an important nerve, for instance; is it in relation to actually important organs, for instance; if you're dealing more in the abdominal region, or around the groin, you take these things into consideration. And here you're in nothing but a muscle mass, the muscles in the inner portion of your thigh. This is in your abductors -- a-b-d-u-c-t-o-r-s -- and nothing more. And, well, I took all of this into account and I just couldn't explain it.

MR. DIAZ: Thank you, Doctor. I have no further questions.

COURT: Is that all, Mr. Hayes?

MR. HAYES: Not quite, Your Honor.

BY MR. HAYES:

Q. Dr. Meuleman, on your original examination, I believe you stressed that different backs are different, is that correct, sir?

A. Yes, sir, they certainly are.

Q. That's the main point which you made.

And you also stated that considering the nature of the injuries, you thought it was doing exceptionally well.

A. He certainly was. I feel that strongly.

Q. Now, pain to the back would come as a result of a fracture, is that correct?

A. Oh, not exclusively, sir, no, no, I disagree with that entirely. You have to take into account what happens to this man's muscle; what happens to his ligaments, what happens to his smaller tendons of the smaller muscles. You're got a host of things that you really have to sort over in your mind. And of course, obvious fractures, too.

Q. And all of these can cause pain in the back?

A. All of these things can, yes, sir." (Tr. 146, 147).

The argument of the defendants' counsel appears to be confined to arguing questions of

fact other than the argument of State law, which is not applicable in a Federal jury trial under the Seventh Amendment to the Constitution of the United States.

John Richard testified that he climbed in darkness to the end of the ladder, that because of bad lighting he was unable to see a proper handhold and slipped and fell.

While admitting that no one saw the point from which John Richard fell, counsel argues that he fell from a point shown on a picture, objecting to Richard being shown the picture at the time of trial to show the point from which he fell. A disputed question of fact.

The defendants' attorney argues that there was sufficient light. A disputed question of fact.

The defendants argue (without evidence in the record) that there was no time to wait until daylight. A question of fact to be found by the jury.

Defendants argue that there was no hurry, despite the testimonv of Richard that the Foreman told him to hurry. A dispute question of fact.

Defendants argue that there was time for plaintiff to fix a sling, although no one instructed him to do so and the person in charge testified, "he did not think a sling was necessary", (page 9 of brief). A disputed question of fact.

Defendants argue as to the amount of the injury sustained by Richard. A disputed question of fact.

The law is well-settled that the jury is

the finder of fact under the Seventh Amendment and that such finding of fact by the jury must be presumed to be correct.

> "On disputed questions of fact the verdict of a jury will be treated as controling, Varveris v. United States Lines Co., 249 F.2d 89, 1957 AMC 2336 (CA 2 NY 1957); Selh v. Moore-McCormack Lines, Inc., 362 F. 2d 541, 1966 AMC 1563 (CA2 NY 1966); Ermaldio v. Pocahontas S.S. Co., 355 F.2d 55, 1966 AMC 587 (CA4 Va. 1966); Continental Oil Co. v. Lindley, 382 SW2nd 296, 1965 AMC 989 (Tex Civ App 1964), error ref n r e; Rodriguez v. Texas Co., 254 F.2d 295, 1958 AMC 1306 (CA2 NY 1958); Gardiner v. New York & Porto Rico S.S. Co., 146 F.2d 420, 1945 AMC 80 (CA2 NY 1944), for even if the question is a close one that fact will not justify either the trial judge or the reviewing court in usurping the function of the jury. Questions of negligence should under proper charge from the trial court be submitted to the jury for their determination.
>
> "When there is sufficient evidence for a jury to consider on the question of negligence, its verdict should not be set aside by a trial judge or an appellate court.
>
> "The test is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Norris, The Law of Seamen, Sec. 701 (3rd Ed.)

The defendants' counsel once wrote, the question of damages is a difficult one to ascertain. Here, there is no dispute that Richard suffered the surgical removal of his coccyx. There is no dispute that he did not work from the time of the accident until the time that he went to work at a service station, at a loss of $200.00 per week in salary from the salary that he made when working for Dresser.

Richard testified that he continues to be disabled. Dr. Elias, when asked if he had any reason to doubt the pain suffered by Richard, said "No"; Dr. Saloom testified that he gave the man pain pills, the defendants' attorney stipulated that the man was being treated by Dr. Gilly until the death of Dr. Gilly, and the testimony of Dr. Meuleman clearly pointed out that he had no explanation for the pain to persist, while admitting that it was entirely possible for it to do so.

We are therefore to consider whether a finding of $125,000.00 for Richard is justifiable.

The Fifth Circuit Court of Appeals in a case involving a verdict for $1,380,000.00 vacated a remittitur under the Maximum Recovery Rule:

> "Gorsalitz, as appellant, vigorously attacks the court's computations of the various items of damages. We pretermit consideration of such detailed criticisms of the court's rationale because we agree with Gorsalitz's over-all attack that the court committed an error of law in failing to apply the proper test of excessiveness, which we hold was the maximum which the jury could reasonably find." Gorsalitz v. Olin Mathieson Chemical Corporation.

429 F.2d 1033 (1970)

The Rule adopted by the Fifth Circuit in Glazer v. Glazer, E. D. La. 1968, 278 F.Supp. 476, 478-482, declares that the plaintiff should receive without remittitur the highest possible jury verdict:

> "The Court also believes that the maximum recovery rule is prefcrable as a matter of policy.
>
> "Where damages are either liquidated or can be determined by the application of fixed rules to any given set of facts, a verdict for more than the amount of damages that would be allowable under a correct computation is wrong as a matter of law and should be set aside. However, in many instances the damages are to be measured in whole or in part by the jury's discretion. This is the situation where recovery is sought for a personal tort, where punitive damages are allowed, or where as here the amount of damages depends in part on what is a reasonable term for a contract. In such cases, the fixing of damages is an integral part of the jury's function."

The defendants made only two grounds in their Motion for Directed Verdict at the Close of all the Evidence:

> "I.
>
> "Plaintiff has failed to establish by a preponderance of the evidence that there was any negligence on the part of Dresser Offshore Services, Inc.

II.

"Plaintiff has failed to establish by a preponderance of the evidence that the vessel question was unseaworthy." (Tr. 223)

Under the Rules of Civil Procedure, therefore, the defendants are precluded from raising the various matters first raised in brief of counsel, such as the alleged insufficiency of medical evidence to sustain a finding for future pain and suffering or disability and made no objection whatsoever to any part of the jury charge with reference to future pain and suffering or disability, only objecting that the Court should instruct the jury that the issue of future impairment of earning capacity and future loss of wages are not before the Court (Tr. 289,290).

Having first raised this issue of error in charge as to future pain and suffering or disability in brief, following the verdict of the jury, defendants are not allowed to use this as a basis to request a new trial. Forgason v. Penrod Drilling Co., et al, 409 F. 2d 813:

"Forgason complains that various instructions were not given to the jury and that the verdict is not supported by the evidence. His attorney made no objections to the instructions and did not preserve his objection to the sufficiency of the evidence by a motion for a directed verdict. Absent plain error, therefore, this Court cannot consider these objections on this appeal. See Pennsylvania Nat'l Mut. & Cas. Ins. Co. v. Nathan, 5 Cir. 1966, 361 F.2d 18, Lrybnik v. Epstein, 2 Cir. 1956, 230 F.2d 683; Fed.R.Civ.P. 51."

The defendants failed to move for a directed verdict on the ground that the medical evidence was not sufficient to sustain a judgment for permanent disability or to allow an award of future damages.

The failure to move for a directed verdict prior to the time that the case went to the jury waived this defense under Rule 12 of the Federal Rules of Civil Procedure.

> "Appellants also contend that the order to show cause was insufficient process. This defense comes too late having been made for the first time in the briefs in this court. The appellants therefore waived all defenses which they did not present by motion or answer, except failure to state a cause of action or lack of jurisdiction of the subject matter. See Rule 12 of Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723C." Carter v. Powell, 104 F.2d 428, (5th Cir. 1939)

> "However, this defense was not presented by any pleading or motion on the part of appellant in the trial court, Rule 12(h), Rules of Civil Procedure, 28 U.S.C.A., provides 'A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or, if he has made no motion, in his answer or reply * * *.' Rule 15 (b) provides - 'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.'" E. I. Dupont Des Nemours & Co. v. Martin, 174 F.2d 602, at p. 604 (6th Cir. 1949)

On the attempts of the defendants to use the subterfuge for the failure to move for a directed verdict on this point, that the Court wrongfully instructed the jury, the defendants did not specifically object to the Court's instruction on future damages, raised no objection to the Court's instruction on life expectancy tables, prepared the interrogatories to the jury which did not exclude the question of future damages, and as the United States Supreme Court said:

> "In fairness to the trial court, and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See Lincoln v. Clafin, 7 Wall. 132, 139, 19 L.Ed. 106; Beaver v. Taylor, 93 U.S. 46, 54, 55, 23 L.Ed. 797; Mobile & M. Ry. Co. v. Jurey, 111 U.S. 584, 596, 4 S.Ct. 566, 571, 28 L.Ed. 527; McDermott v. Severe, 202 U. S. 600, 611, 26 S.Ct. 709, 713, 50 L.Ed. 1162; Norfolk & W. Ry. Co. v. Earnest, 229 U.S. 114, 122, 33 S.Ct. 654, 657, 57 L.Ed. 1096; Pennsylvania R. Co. v. Minds, 250 U.S. 368, 375, 39 S.Ct. 531, 533, 63 L.Ed. 1039. That long standing rule of federal practice is applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating."
> Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 483, (1943)

> "In the first place it does not appear that the appellants entered seasonable and distinct objections to the language which they now assert injured them. Rule 51 of the Federal Rules of Civil Procedure requires such an objection as a condition precedent to assigning error on appeal in respect to the giving of any instruction. Williams v. National Surety Corp., 257 F.2d 771 (5th Cir. 1958). If the proper objection does not appear in the record, then the appellate court need not consider the alleged error. 9 Cyclopedia of Federal Procedure, Sec. 31.106 (3rd Ed. 1951) Even if the appellants had properly objected to the specified portions of the trial court's charge, they could not prevail in the present appeal, since the charge, when read as a whole, gives a 'full and comprehensive statement of the applicable law ...' Lumberman's Mutual Casualty Co. v. Nolan, 331 F.2d 711, 712 (5th Cir. 1964)" Burns v. Travelers Insurance Company, 344 F.2d 70, at pp. 72, 73.

Where party might have obtained correct charge by specifically calling attention of trial court to error and part of charge was correct, he may not through general exception obtain new trial, and rule cannot be avoided by reason of requested charge. Hardware Mut. Cas. Co. v. Jones, C.A. Va. 1966, 363 F.2d 627.

Plaintiff was not entitled to new trial because of error in charge, where plaintiff did not object specifically and did not call judge's attention to error. John J. Trombetta Co.v. Goldstein and Procacci, D.C. Pa. 1961, 198 F. Supp. 288.

Having failed to take exception to charge at time of trial, movant could not successfully urge, as ground for new trial, that instruction had created an improper inference. Pennsylvania Turnpike Commission to Use of Fink v. Seaboard Sur. Co., D.C. Pa. 1958, 164 F.Supp. 723, 724.

Having failed to object to instructions given or to request further instructions when given opportunity so to do, defendant could not on motion for new trial, successfully complain of failure to charge, unless fundamental error was present. Picard v. Pittsburgh & O. Y. Ry. Co., D.C. Pa. 1957, 153 F.Supp. 583, 585.

Where, in action against railroad under Section 51 et seq. of Title 45, railroad failed to object to portion of charge before jury retired, even if charge was erroneous, it would be no ground for granting a new trial. Schirra v. Delaware, L. & W. R. Co., D.C. Pa. 1952, 103 F.Supp. 812, 821.

Complaint on motion for new trial that trial court erred in instructing jury would be held without merit, where no objections to the charge given were made. Koenigsdorf v. Cook, D.C. Mo. 1950, 88 F.Supp. 469, 470.

Defendant who objected to instruction but stated no grounds for objection did not preserve objection for review. Gorsalitz v. Olin Mathieson Chemical Corp., C.A. Tex. 1970, 429 F.2d 1033.

Objection to instruction must be sufficiently specific to bring into focus the precise nature of the alleged error, and general objection presents nothing for review. Delancey v. Motichek Towing Service, Inc., C.A. La. 1970, 427 F.2d 897, 900.

Objection to instruction in the form, "In regard to defendant's submitted special charges 5 and 6 we would like to object to the Court having given those charges', was not sufficient to preserve any point for appellate review, id.

In Delancey v. Motichek Towing Service, Inc., supra, the Court said:

> "Rule 51 expressly requires that the party objecting to any instruction must state 'distinctly the matter to which he objects and the grounds of his objection'. This Court has consistently held that the specifications of errors dealing with the giving of or failure to give instructions will not be considered unless the party objects in the manner provided by the rule. Nowell v. Dick, 5 Cir. 1967, 413 F.2d 1204; Guest House Motor Inn, Inc. v. Duke, 5 Cir. 1967, 384 F.2d 922; Cockrell v. Ferrier, 5 Cir. 1967, 375 F.2d 889; Williams v. Hennessey, 5 Cir. 1961, 328 F.2d 490, 491; Pruett v. Marshall, 5 Cir. 1960, 283 F.2d 436; Williams v. Atlantic Coast Line R. R., 5 Cir. 1951, 190 F. 2d 744. The objection must be sufficiently specific to bring into focus the precise nature of the alleged error. Palmer v. Hoffman, 1943, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; Atlantic Coast Line R. R. v. Gunter, 5 Cir. 1956, 229 F.2d 842. A general objection presents nothing for review. Lumbermans Mut. Cas. Co. v. Hutchins, 5 Cir. 1951, 188 F.2d 214. See Charles A. Wright, Inc. v. F. D. Rich Co., 1 Cir. 1966, 354 F.2d 710, cert. denied, 384 U.S. 960, 86 S.Ct. 1586, 16 L.Ed.2d 673.

"In Lumbermens the defendant objected specifically to the district court's submitting charges 2, 3, 4, 8, 9, 10, 11 and 14 of the plaintiff's Special Requested Charges. On appeal, notwithstanding the reference to numbered charges, this Court held that the appellant had failed to comply with the specificity requirement of Rule 51. See also Elliot v. Watkins, Trucking Co., 7 Cir. 1969, 406 F. 2d 90, 92.

"We hold that the appellants objection to the submission of the defendant's requested instructions was not sufficient to preserve that point for appellate review."

It is therefore submitted that the defendants have no basis for a new trial on the grounds alleged in their brief.

SUMMARY OF ARGUMENT

I. Petitioners for certiorari have not been denied "due process" because their counsel did not make oral argument to the Fifth Circuit Court of Appeals:

The United States Supreme Court specifically held in Price v. Johnston, that oral argument on appeal is not a requirement of due process:

"Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates.

"A prisoner's right to participate

> in oral argument on appeal is accordingly to be determined by the exercise of the discretionary power of the circuit court of appeals under Section 262." Price v. Johnston, 334 U.S. 266, page 286, 92 L.Ed. 1356, 68 S. Ct. 1049, page 1060 (1948)

II. The failure of the Trial Court to instruct as defendants requested was not properly objected to as required by Rule 51 of the Federal Rules of Civil Procedure, and the defendants' requested instructions were properly refused, and the jury verdict should be sustained.

In each of the cases cited by defendants as to the question of failure to instruct the jury as to income tax and the verdict, the Courts of Appeal sustained the jury verdict and held the failure to instruct the jury as to income tax was not reversible error;

Cunningham v. Bay Drilling Company, 421 F.2d 1398; Payne v. Baltimore and Ohio Railroad Company, 6th Cir., 1962, 309 F.2d 546; Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3rd Cir., 1971), cert. den., 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165, Oct. 19, 1971; McWeeney v. New York, New Hampshire and Hartford R.R. Co., 282 F.2d 34 (2nd Cir., 1960).

The trial began December 14, 1972 and was concluded December 17, 1972, and the failure of the Court to instruct in accordance with a decision rendered February 2, 1973, by the Fifth Circuit in Dugas v. The Kansas City Sou. Rwy. Lines, 473 F.2d 821, 826 (5th Cir. 1973), TWENTY-SEVEN DAYS AFTER THE VERDICT should not be considered where the defendants made no objection to the charge on that basis prior to the jury verdict.

The objection to the failure to give requested Charge 12 was without giving reasons, in violation of Rule 51 and presents nothing for review; Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 rehearing denied 318 U.S. 800, 63 S.Ct. 757, 87 L.Ed. 1163:

> "Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See Lincoln v. Claftin, 7 Wall. 132, 139, 19 L.Ed. 106; Beaver v. Taylor, 93 U.S. 46, 54, 55, 23 L.Ed. 797; Mobile & M. Ry. Co. v. Jurey, 111 U.S. 584, 596, 4 S.Ct. 566, 571, 28 L.Ed. 527; McDermott v. Severe, 202 U.S. 600, 611, 26 S.Ct. 709, 713, 50 L.Ed. 1162; Norfolk & W. Ry Co. v. Earnest, 229 U.W. 114, 122, 33 S.Ct. 654, 657, 57 L.Ed. 1096; Pennsylvania R. Co. v. Minds, 250 U.S. 368, 375, 39 S. Ct. 531, 533, 73 L.Ed. 1039. That long standing rule of federal practice is applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating." Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 483 (1943)

III. The Trial Court properly refused to upset the jury verdict and grant a new trial or remittitur. The defendants raise only the questions of disputed questions of fact, and cite defendants' appreciation of one Doctor's testimony as opposed to the testimony of the plaintiff and others that he was disabled and unable to work at his former occupation, sustaining a loss of wages permanent in nature, a disputed question of fact which was properly decided by the jury.

> "The jury's power to draw the inference that the aggravation . . . was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes.
>
> "The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration." Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, at page 175.

CONCLUSION

Defendants operated a derrick where the lights failed in the night due to water and burned wires (Tr. 208). Richard, stipulated to be a seaman, was ordered up into the dark tower to change a light bulb. No reason was shown why the bulb could not have waited to be changed until daylight, his supervisor testifying that there was no need to hurry (Tr. 213).

Richard climbed up, from what he could see, reached for a beam -- and fell down to a steel tool shed. He was cut between his legs and his entire tailbone was removed. His sacrum (a portion of the spine) was also fractured. The accident occurred on July 15, 1970 and at the time of the trial, December 12, 1972, he was still taking pain pills, and testified that he was disabled, had dropped in pay from $275.00 per hitch to $75.00 per week and the hospital records and reports clearly showed he had walked on crutches, suffered as a result of the fall and operation, and told his doctors his pain still persisted following the removal of his entire tailbone.

It was agreed that Richard had reached the point where the doctors could do nothing further for him than to prescribe pain pills.

The jury verdict for Richard was reduced ten (10%) per cent by contributory negligence, and was not an excessive verdict.

The trial judge refused to grant a remittitur and refused to grant a new trial.

The United States Court of Appeals, Fifth Circuit, affirmed.

It is respectfully submitted that certiorari should not be granted herein.

Respectfully submitted,

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PROOF OF SERVICE

I, FREDRIC G. HAYES, attorney for John Carlyle Richard, Respondent, hereby certify that on this day I served a copy of the foregoing brief on Mr. James E. Diaz, Davidson, Meaux, Onebane, Donohoe, Bernard, Torian & Diaz, Post Office Drawer 3507, Lafayette, Louisiana, 70501, attorney for petitioners, by depositing a copy thereof in the United States Mails, properly addressed to the said attorney, postage prepaid.

Lafayette, Louisiana, this 13th day of March, 1974.

FREDRIC G. HAYES